

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1928

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United States Court of Appeals

For the Second Circuit.

INTERSTATE COMMERCE COMMISSION,
Plaintiff-Appellee,
v.

AIRFREIGHT TRANSPORTATION CORPORATION
OF NEW JERSEY, NEW DEAL DELIVERY
SERVICE, Inc., and EXPRESS/S.D.Z., Inc.,
Defendants,

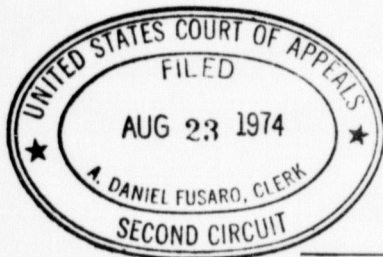
AIRFREIGHT TRANSPORTATION CORPORATION
OF NEW JERSEY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

JOINT APPENDIX.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1974

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UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

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INTERSTATE COMMERCE COMMISSION,

Plaintiff-Appellee,

v.

AIRFREIGHT TRANSPORTATION CORPORATION OF NEW JERSEY, NEW
DEAL DELIVERY SERVICE, INC. and EXPRESS/S.D.Z., INC.,

Defendants,

AIRFREIGHT TRANSPORTATION CORPORATION OF NEW JERSEY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK.

-----X

DOCKET ENTRIES.

DOCKET ENTRIES

| DATE | FILINGS--PROCEEDINGS | AMOUNT REPORTED IN FIDUCIARY RETURN |
|----------|---|--|
| 5-17-73 | Complaint filed. Summons issued. | 1 |
| 5-24-73 | Deft's. interrogatories to pltff. filed. (New Deal Delivery) | 2 |
| 5-29-73 | ANSWER of New Deal Delivery Service, Inc. filed. | 3 |
| 6-11-73 | Summons returned & filed./Executed. | 4 |
| 6-12-73 | Pltff's answers to interrogatories filed. | 5 |
| 6-14-73 | Stipulation extending deft Airfreight Transportation Corp. of N.J. time to answer complaint to 7-16-73 filed. | 6 |
| 6-19-73 | Notice to take deposition of pltff filed. | 7 |
| 6-19-73 | Copy of letter from Robert W. Piken to John F. Curley dtd 6-18-73 filed. | 8 |
| 7-19-73 | Stipulation extending time for AIRFREIGHT TRANSPORTATION CORP. to answer to the complaint to 7-30-73 filed. | 9 |
| 7-30-73 | Answer of Airfreight Transportation Corporation of New Jersey filed. | 10 |
| 8-14-73 | Notice of motion for an order striking pltff's complaint and entering Judgment by default in favor of deft ret 9-14-73 filed. | 11 |
| 9-11-73 | Reply affidavit of John F. Curley filed. | 12 |
| 9-14-73 | Before MISHLER, CH. J. Case called- Defts motion striking Pltff complaint etc. Motion argued & adj'd to 10-5-73 | |
| 9/21/73 | Reply of Deft New Deal filed, with annexed affidavit and annexed notice to take deposition filed. | 13 |
| 9-25-73 | Pltff's Answer to Interrogatories filed. | 14 |
| 10-1-73 | Pltff's amended answer to interrogatories filed. | 15 |
| 10-5-73 | Before MISHLER, CH. J - Case called for hearing on deft's motion striking pltff's complaint. Motion submitted. Decision reserved. | |
| 10-9-73 | Affidavit of Arthur J. Pitken in support of motion of deft New Deal Delivery, Inc. filed. | 16 |
| 10-15-73 | Reply affidavit of John F. Curley filed. | 17 |
| 10-16-73 | Pltff's interrogatories and request for admissions filed. | 18/19 |
| 10-20-73 | Pltff's request for admissions filed. | 20 |
| 11-2-73 | Letter from Robert W. Piken dtd 10-30-73 filed. | 21 |
| 11-9-73 | Deft New Deal's admissions filed. | 22 |
| 11/26/73 | Answers to Request for Admission filed. | 23 |
| 11-26-73 | Deft Airfreight's answers to pltff's requests for admission filed. | 24 |
| 11-26-73 | Deft New Deal's answers to pltff's interrogatories filed. | 25 |

DOCKET ENTRIES

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| DATE | FILINGS-PROCEEDINGS | CLERK'S FEES | | AMOUNT REPORTED IN EMOLUMENT RETURNS |
|---------|--|--------------|-----------|---|
| | | PLAINTIFF | DEFENDANT | |
| | strike the complaint, etc. as of | | 26 | |
| 2-11-73 | Letter dtd. 12-6-73 from Harris Birnbaum to Judge Mishler filed. | | 27 | |
| 2-11-73 | By MISHLER, CH. J. - Memorandum of decision dtd. 12-7-73 set down for hearing on 12-21-73 @11:00A.M. | | 28 | |
| 2-21-73 | Before MISHLER, CH. J. - Case called. Trial date reset for 2-25-74 on consent of all parties. | | | |
| 3/8/74 | Interrogatories served upon Thomas W. Hopp filed | | 29 | |
| 1-28-74 | Notice of motion to quash proposed taking of deposition ret. 2-1-74 @ 10:00 A.M. filed. | | 30 | |
| 3/1/74 | Before MISHLER, CH. J. - Case called- Motion adjd to 2/22/74 on consent | | | |
| 2/14/74 | Affidavit of Arthur J. Piken in Opposition filed. | | 31 | |
| 2/14/74 | Notice of Cross-Motion ret. 2/22/74 filed re: to permit inspection, etc. | | 32 | |
| 2-20-74 | Clerk's notice of default filed. | | 33 | |
| 2-22-74 | Before MISHLER, CH. J. - Case called for hearing on defts motion for an order for plttf to produce. Motion argued & granted. Pltffs' motion for an order to quash the proposed taking of deposition withdrawn. | | | |
| 2-25-74 | Instrument on former ICC employee Thomas W. Hopp filed | | 34 | |
| 2-25-74 | Before MISHLER, CH. J. - Case called. Trial ordered and begun.(non-jury). Default entered as to deft S.D.Z. Inc. Trial to be continued on 2-26-74 at 10 A.M. | | | |
| 2-26-74 | Before MISHLER, CH. J. - Case called. Trial resumed. Government rests. Deft. Airfreight motion to dismiss denied. Defts. rest. Trial concluded - Decision rendered. All briefs by 3-8-74. | | ---- | |
| 4-20-74 | By MISHLER, CH. J. - Memorandum of decision and order dtd 4-19-74 directing parties to settle a judgment on not less than two days notice enjoining defts Airfreight and Express and dismissing the complaint as against deft New Deal filed.(p/c mailed to attys).-MM | | 35 | |
| 4/29/74 | Notice of appeal filed. Duplicate of notice and docket entries mailed to C of A. in | | 36 | |
| 5-10-74 | By MISHLER, CH. J. - JUDGMENT dtd 5-10-74 granting permanent injunction against defts Airfreight Transportation Corp of N.J. & Express/S.D.Z. Inc & dismissing complaint filed.(p/c mailed to attys).-MM | | 37 | |

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MEMORANDUM OF DECISION AND ORDER.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

INTERSTATE COMMERCE COMMISSION,

73 C 700

Plaintiff,

-against-

Memorandum of Decision
and Order

AIRFREIGHT TRANSPORTATION CORPORATION
OF NEW JERSEY, NEW DEAL DELIVERY
SERVICE, INC., and EXPRESS/S.D.Z.,
INC.,

April 19, 1974

Defendants.

The Interstate Commerce Commission (ICC) seeks to enjoin defendant Airfreight Transportation Corporation of New Jersey (Airfreight) from engaging in interstate operations without a certificate or permit issued by the Commission, and defendants New Deal Delivery Service, Inc. (New Deal) and Express/S.D.Z., Inc. (Express) from aiding and abetting Airfreight's allegedly unlawful practice.^{/1} The trial was to the court without a jury.

The complaint alleges that from October 21, 1971 to and including December 28, 1971, Airfreight, aided and

^{/1} Express failed to answer the complaint and is, therefore, in default. The court has been advised that Express is a defunct corporation.

MEMORANDUM OF DECISION AND ORDER

abetted by New Deal, transported merchandise by motor vehicle from Jamaica, New York to Stamford, Connecticut without authorization from the ICC, and that from February 15, 1972 to and including May 9, 1972, Airfreight, aided and abetted by Express, transported merchandise by motor vehicle from Jamaica, New York to Boston, Massachusetts, again without authorization from the ICC. The acts and operations of the defendants are, the plaintiff contends, in violation of §§ 203(c), 206(a)(1), and 209(a)(1) of the Interstate Commerce Act and should be enjoined by this court.

Sections 203(c), 206(a)(1) and 209(a)(1) of the Interstate Commerce Act,¹² 49 U.S.C. §§ 303(c), 306(a)(1), and 309(a)(1), prohibit the for-hire transportation by motor vehicle and the operation of a contract carrier by motor vehicle in interstate commerce without a permit or

¹²Section 203(c) provides in relevant part that:

[N]o person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway . . . unless there is in force with respect to such person a certificate or permit issued by the Commission authorizing such transportation

(continued on page 3)

MEMORANDUM OF DECISION AND ORDER

a certificate of convenience and necessity issued by the ICC. Jurisdiction to enforce the provisions of the Act by restraining carriers from committing further violations is conferred on this court by § 222(b), 49 U.S.C. § 322(b).¹³

¹² (continued)

Similarly, § 206(a)(1) provides that:

[N]o common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operations on any public highway . . . unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations

Section 209(a)(1) provides that:

[N]o person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway . . . unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business

It should be noted that Airfreight did not make application to the ICC to operate as a contract carrier.

¹³ Section 222(b) provides that:

If any motor carrier . . . operates in violation of any provision of this chapter . . . the Commission or its duly authorized agent may apply to the district court of the United States . . . for the enforcement of such provision of this chapter . . . and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction . . . restraining such carrier from further violation of such provision of this chapter.

MEMORANDUM OF DECISION AND ORDER.

The court finds (1) that Airfreight transported goods from Jamaica, New York to Stamford, Connecticut seventeen times on the dates set forth in Appendix "A" of the complaint and charged the fees set forth therein; (2) that Airfreight transported goods from Jamaica, New York to Boston, Massachusetts thirteen times on the dates set forth in Appendix "A" of the complaint and charged the fees set forth therein; and (3) that Airfreight was not authorized by the ICC to transport merchandise to Stamford or to Boston.^{/4} The court therefore concludes that the shipments were in violation of §§ 203(c) and 206(a)(1) of the Act.

The participation of New Deal and Express in the illegal activity has been established. Upon arrival of a shipment at John F. Kennedy International Airport destined for Clairol, Inc. at Stamford or for Northeast Airlines in Boston, one James Farrell, an employee of Export-Import Services, Inc. (a custom broker for Clairol and Northeast), notified Airfreight and placed an order with Airfreight for the transportation of the merchandise. Airfreight shipped

^{/4} Airfreight was only authorized to operate between New York and certain points in New Jersey. (Plaintiff's Exhibit 6.)

MEMORANDUM OF DECISION AND ORDER

the goods using only Airfreight equipment.^{/5} After each shipment, however, Airfreight submitted false documents and reports to the ICC^{/6} designed to show that New Deal leased vehicles from Airfreight, performed the transportation services, and returned the vehicles upon completion of the services. New Deal was fully aware of the violations set forth above. New Deal knew that Airfreight was not authorized to transport freight for hire to Stamford, Connecticut and Boston, Massachusetts, and knowingly participated in the violations.

In determining whether an injunction should issue, the controlling factor is the danger of recurrent violations.^{/7} Evidence of past violations, while not dispositive, "gives rise to an inference of a reasonable expectation of continued violations" SEC v. Manor Nursing Centers,

^{/5} In the thirty shipments set forth in Appendix "A" of the complaint, receipts for merchandise were executed on Airfreight forms, freight charges were submitted on Airfreight invoices, and the shipper paid the freight charges to Airfreight.

^{/6} The false documents consisted of reports of vehicle inspections, driver's logs, driver's medical certificates, and receipts for vehicles.

^{/7} See United States v. W.T. Grant Co., 345 U.S. 629, 73 S.Ct. 894 (1953); SEC v. Shapiro, ____ F.2d ____ (2d Cir. April 9, 1974).

MEMORANDUM OF DECISION AND ORDER

Inc., 458 F.2d 1082, 1100 (2d Cir. 1972).

Defendants argue that such an inference is not justified where, as in the instant case, defendants discontinued their illegal conduct. Airfreight states that when it was advised by the ICC that its activities were not in accord with ICC rules and regulations, it promptly discontinued the shipments to Stamford and Boston.^{/8} New Deal claims that it has severed its relationship with Airfreight and has not engaged in any illegal activities for more than two years.^{/9}

Voluntary cessation of illegal conduct does not deprive the court of the power to issue an injunction; it is merely one of the factors which may be considered in determining the appropriateness of injunctive relief.

United States v. W.T. Grant Co., 345 U.S. 629, 633, 73 S. Ct. 894, 898 (1953); ICC v. Barron Trucking Co., Inc., 276

^{/8}

Thomas W. Hopp, the District Supervisor of the ICC, conferred with Airfreight on April 26, 1973. Airfreight's unlawful shipments continued until May 9, 1972.

^{/9}

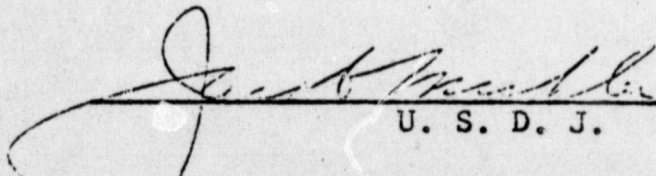
Hopp conferred with New Deal on March 15, 1972. New Deal's participation in Airfreight's scheme ended on December 28, 1971.

MEMORANDUM OF DECISION AND ORDER

F.2d 275 (3d Cir. 1960). Airfreight discontinued its illegal activities only after an investigation was initiated by the ICC. See SEC v. Culpepper, 270 F.2d 241, 249 (2d Cir. 1959). Express's participation in the activities likewise did not cease until/ ^{after} the commencement of the investigation. The court concludes that the cessation by Airfreight and Express was not voluntary and that the history of their past violations supports the inference that they are reasonably likely to commit future violations. New Deal, in contrast, voluntarily ceased its illegal activities approximately three months before the investigation commenced. The court is unable to find any reasonable likelihood of future violations by New Deal.

The parties are directed to settle a judgment on not less than two days notice enjoining the defendants Airfreight and Express and dismissing the complaint as against New Deal.

This memorandum of decision contains findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.



U. S. D. J.

12a

ORDER.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

INTERSTATE COMMERCE COMMISSION,

Plaintiff,

- against -

CIVIL ACTION
NO. 73 C 700

AIRFREIGHT TRANSPORTATION CORPORATION
OF NEW JERSEY, NEW DEAL DELIVERY
SERVICE, INC., AND EXPRESS/S.D.Z.,
INC.,

Defendants.

ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT, defendants Airfreight Transportation Corporation of New Jersey, its agents, employees, representatives, and all persons, firms, companies, and corporations, and their respective officers, agents, servants, employees, and representatives, in active concert or participation with them, be perpetually enjoined and restrained from in any manner or by any device, directly or indirectly, transporting or holding out to transport property in interstate commerce by motor vehicle for compensation, on public highways, as a for-hire, common or contract carrier, by motor vehicle, unless

ORDER

and until such time, if at all, as there is in force with respect to said defendant a certificate of public convenience and necessity, or a permit or other form of authority issued by the Interstate Commerce Commission authorizing such particular transportation and operations.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT, Express/S.D.Z., Inc., its agents, employees, and representatives, in active concert or participation with defendant be perpetually enjoined or restrained from in any manner or by any device, directly or indirectly, aiding and abetting Airfreight Transportation Corporation of New Jersey in transporting or holding out to transport property in interstate commerce by motor vehicle, for compensation, on public highways, as a for-hire, common or contract carrier by motor vehicle without lawful authority.

14a

ORDER

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT, the
complaint herein is dismissed as to defendant New Deal Delivery
Service, Inc.

DATED THIS 10 DAY
OF MAY, 1974.

S/
UNITED STATES DISTRICT JUDGE
Jacob Mishler

JUDGEMENT ENTERED:

Clerk

EXCERPTS FROM TRANSCRIPT OF TESTIMONY.

1 THE COURT: Can't you submit a memo on this?

7 2 MR. BIRNBAUM: Yes, I can. I can give your
3 Honor, I submit these are things that your Honor can
4 take and should take into consideration, and I will
5 expand on this in the memorandum of law, and I think
6 that and that alone as far as my client is concerned,
7 is the issue here.

8 THE COURT: Frankly, I don't think I have
9 discretion. I may only find facts but once I find the
10 facts, if the facts require an injunction then I must
11 issue. I can't decide that for you. I won't issue it
12 but for Mr. Smith on the same facts I will issue it.
13 That's the way it works.

14 MR. BIRNBAUM: I think your Honor will -- if
15 your Honor will permit me, that there are cases that
16 say --

17 THE COURT: All right, you give me the facts, I
18 can only tell you of the lawyers coming into this Court
19 and saying, Judge, this is a Court of justice, I say no,
20 it's a Court of law; justice is sometimes done, but some
21 people are hurt by rulings made according to law. I
22 don't make up this law on an ad hoc basis, I think
23 seriously about these things. I research it. If the
24 cases sustain what I say that's the way it will go; if
25 they don't the mere fact your client may be hurt, I
can't help it.

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

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MR. BIRNBAUM: Your Honor sits as a Court of equity.

THE COURT: It's still a Court of law, the equity doesn't mean do what your heart tells you to do.

MR. BIRNBAUM: Equity means do what's fair.

THE COURT: Don't look at the individual case and say no injunction because if you apply to ICC it will be held against you, that isn't even in the case, that's not part of the issues. The question here is whether there is a chance of recurrence here; whether the public has to be protected against the possibility of recurrence, that's a different principle than asking me to look into the sympathetic considerations and how he would be handled if I granted an injunction. I can't do that. All I can say if it happens and that's the result I'm terribly sorry; it may even be unfair, but I'm not going to make my decision based on whether he has a black mark or gets an award.

MR. BIRNBAUM: I'm completely confident your Honor will follow the prevailing authority, and all I ask is an opportunity to submit it to you.

THE COURT: That's what I hope to do.

MR. BIRNBAUM: And I should also most respectfully point out, sir, that the burden of proof --

THE COURT: Is on the Government, no question

EXCERPTS FROM TRANSCRIPT OF TESTIMONY
1 about it; is on the ICC, they will have to prove their
2 case. They have practically proven the facts. They
3 have proven the facts. The only thing they haven't
4 proven is the good faith or the lack of good faith, and
5 I don't believe it's an issue.)

6 MR. BIRNBAUM: Isn't it incumbent --

7 THE COURT: I should even say on the record they
8 haven't proven lack of good faith. All I say that's
9 the only issue that seems to be alive that might bear
10 on the question of the relief.

11 MR. BIRNBAUM: What about the continuance of the
12 act? Isn't there an affirmative burden on them?

13 THE COURT: They have approving the possibility
14 of occurrence, possibility that they will continue
15 after the case has been determined.

16 MR. BIRNBAUM: I think it has to be more than a
17 mere possibility.

18 THE COURT: Probability if you wish, likelihood.

19 MR. BIRNBAUM: They have to show --

20 THE COURT: All that --

21 MR. BIRNBAUM: That there is some realism in the
22 continuance, and I think absent that there is no
23 sufficient prima facie proof.

24 THE COURT: I could take into consideration that
25 this action has been pending, that may have been a

services, of three (3), copies of

the within

herby admitted this 23rd day

of August, 1974

John F. Ashley
Attorney for